No. 08-820

In the Supreme Court of the United States

DONALD W. BAIN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that the district court had not applied a presumption of reasonableness in sentencing petitioner within the advisory Sentencing Guidelines range.

2. Whether a criminal defendant's contention on appeal that the district court committed procedural errors in imposing a criminal sentence is reviewable only for plain error when the defendant never informed the district court of his objections.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 537 F.3d 876.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2008. A petition for rehearing was denied on October 6, 2008 (Pet. App. 42). The petition for a writ of certiorari was filed on December 29, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Iowa, petitioner was convicted of receiving and distributing child pornography, in violation of 18 U.S.C. 2252(a)(2), and possessing child pornography, in violation of 18 U.S.C.

2252(a)(4)(B). He was sentenced to 210 months of imprisonment, to be followed by ten years of supervised release. The court of appeals affirmed. Pet. App. 1-22, 37.

1. On February 9, 2005, agents of the Federal Bureau of Investigation executed a search warrant at petitioner's house. The agents seized three computers and numerous computer disks containing hundreds of images and digital movies depicting minors engaged in sexual acts. The images in petitioner's collection were extremely graphic and depicted sadistic violence, torture, and rape. Petitioner admitted to the agents that he had engaged in online trading of child-pornography files from his home. Pet. App. 2; Gov't C.A. Br. 2-5.

2. A grand jury in the Southern District of Iowa returned an indictment charging petitioner with one count of receiving and distributing child pornography, in violation of 18 U.S.C. 2252(a)(2), and one count of possessing child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). Petitioner pleaded guilty to both counts. Gov't C.A. Br. 1.

3. The Probation Office prepared a Presentence Investigation Report (PSR). The PSR recommended a base offense level of 22 under the advisory Sentencing Guidelines. PSR ¶ 29. It also recommended several offense-level enhancements: (1) two levels under Guidelines § 2G2.2(b)(2) because some material involved minors under age 12; (2) five levels under Guidelines § 2G2.2(b)(3)(B) because petitioner had traded the material for more child pornography; (3) four levels under Guidelines § 2G2.2(b)(4) because some material portrayed sadism, masochism, or other depictions of violence; (4) two levels under Guidelines § 2G2.2(b)(6) because petitioner had used a computer to receive and dis-

tribute material; and (5) five levels under Guidelines § 2G2.2(b)(7)(D) because the offense involved more than 600 images. PSR ¶ 30. The PSR recommended a decrease of three levels for acceptance of responsibility, resulting in a total offense level of 37. *Id.* ¶¶ 36, 37. With a criminal history category of I, petitioner's advisory Guidelines range was 210 to 262 months of imprisonment. *Id.* ¶ 85.

At the sentencing hearing—which took place after this Court's decision in *Rita* v. *United States*, 127 S. Ct. 2456 (2007), but before the Court's decision in *Gall* v. *United States*, 128 S. Ct. 586 (2007)—the district court accepted the PSR's Guidelines calculations. Pet. App. 25. Petitioner requested the statutory minimum sentence of 60 months, and the court responded:

> I can't do that. Hang on. In order to go below the Guidelines pursuant to 3553 which are viewed in the Eighth Circuit now as affirmed by the United States Supreme Court as presumptively reasonable, there's got to be a ground for a variance. I mean, what are the grounds for a variance of as much as two-thirds to three-fourths of the sentence under the Guidelines?

Id. at 29-30.

Petitioner acknowledged that "[a] grounds for variance that make it acceptable in the Guidelines does not exist," but argued that his character, history, and low likelihood of recidivism justified a lenient sentence. Pet. App. 30. The government disagreed with petitioner's claim that his offense was an aberration, but it suggested that a sentence at the bottom of the advisory Guidelines range would be sufficient. *Id.* at 34-35.

The district court then stated:

> It is a terribly painful Presentence Report to read because of what you are throwing away here. You said there's no legal speed limit on the Internet. That's true enough, but you have had the benefit your whole life of loving, supportive relationships and you had a moral compass that was better than any speed limit sign on the Internet. You knew when you were doing it that it was wrong, you just didn't know how serious the punishment is for this offense and so you are right, you have—you're going to pay dearly, your wife is going to pay dearly, everybody associated with you is going to pay dearly and it is painful because you were by all accounts very successful, a contributing member to your community, certainly to your workplace, it is harsh.

Pet. App. 35. The court added that it had considered the Section 3553(a) factors, and it observed that "the number of images involved here and the amount of trading of files puts this case above the garden variety." *Ibid.*

The district court then stated that the Sentencing Guidelines "are presumed reasonable here in the Eighth Circuit Court of Appeals." Pet. App. 36. The court noted that the Guidelines "are not mandatory," but it recognized that they are "an important though not singularly controlling factor to be considered." *Ibid.* The court then stated that "[b]ased on all the circumstances of this case the Court concludes that a sentence at the bottom of the range is sufficient to address the essential sentencing considerations." *Id.* at 37. It therefore sentenced petitioner to 210 months of imprisonment. *Ibid.* After imposing sentence, the court asked petitioner's

counsel, "do you have anything else?" *Id.* at 41. Counsel replied, "[n]o, your Honor." *Ibid.*

4. The court of appeals affirmed. Pet. App. 1-22.

a. The court first considered petitioner's argument that the district court had committed procedural sentencing error by treating the Sentencing Guidelines as presumptively reasonable, in violation of *Rita*, and by requiring extraordinary circumstances to justify a non-Guidelines sentence, in violation of *Gall*. Pet. App. 5. The court held that the district court's references to the presumption of reasonableness were references to an appellate presumption, not to a sentencing-court presumption, and that the district court's approach therefore was not inconsistent with *Rita*. *Id.* at 6.

The court of appeals then held that the district court had "committed *Gall* error by requiring extraordinary circumstances to justify the requested non-guidelines sentence." Pet. App. 6-7; see *id.* at 6-8. The court noted that petitioner had requested a non-Guidelines sentence, but it found that request insufficient to preserve his claim of *Gall* error. *Id.* at 8-10. The court explained that, in order to preserve such a claim for plenary appellate review, a defendant "must object to the district court's erroneous application of the law." *Id.* at 9. Because petitioner had failed to raise such an objection at sentencing, the court of appeals reviewed the claim for plain error only. *Id.* at 9-10. Applying plain-error review, the court held that the district court's *Gall* error had not affected petitioner's substantial rights because petitioner had not shown a reasonable probability that he would have received a lower sentence if the error had not occurred. *Id.* at 11-12.

The court of appeals next reviewed, under an abuse-of-discretion standard, the substantive reasonableness

of petitioner's sentence. Because the district court had committed *Gall* error and therefore had not "*independently* reach[ed] the same conclusion" as the Sentencing Commission with respect to the proper sentence, the court of appeals did not apply the normal appellate presumption of reasonableness to the within-Guidelines sentence. Pet. App. 13. The court nevertheless found the sentence substantively reasonable. Noting the district court's "detailed consideration of the § 3553(a) factors," *id.* at 16, the court found itself unable to say that a 210-month sentence was "outside the range of choice dictated by the facts of the case," *id.* at 17 (quoting *United States* v. *Jones*, 507 F.3d 657, 659 (8th Cir. 2007)).

b. Judge Benton filed a concurring opinion. Pet. App. 17-22. In his view, because the district court had committed *Gall* error, that court could not have seriously considered petitioner's arguments for a 60-month sentence, and "therefore the entire § 3553(a) explanation is tainted by the *Gall* error." *Id.* at 20. Judge Benton stated that, because the court of appeals had "no reliable basis for substantive review, this sentence should be reversed and remanded for resentencing in order to fulfill the mandate of *Gall*." *Id.* at 21. Judge Benton nevertheless concurred in the court of appeals' decision affirming petitioner's sentence because circuit precedent requiring plain-error review of unpreserved *Gall* error did not allow a remand. *Id.* at 22.

ARGUMENT

Petitioner contends (Pet. 14) that the court of appeals "circumvent[ed]" this Court's decision in *Rita* v. *United States*, 127 S. Ct. 2456 (2007), when it held that the district court had not applied a presumption of rea-

sonableness to the Sentencing Guidelines range. He further argues (Pet. 23) that the court of appeals "circumvent[ed]" this Court's decision in *Gall* v. *United States*, 128 S. Ct. 586 (2007), when it held that petitioner had not preserved his claim of procedural error at sentencing. Those claims lack merit, and the decision of the court of appeals is consistent with both *Rita* and *Gall*. Further review is not warranted.

1. a. This Court held in *Rita* that, although a court of appeals may apply a "presumption of reasonableness" to a within-Guidelines sentence, "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." 127 S. Ct. at 2465. The sentencing court's task is to consider the PSR, to listen to the arguments of the government and the defendant, and then to impose a sentence after evaluating the factors set out in 18 U.S.C. 3553(a). *Ibid.* The Court reiterated that point in *Gall*, stating that, in considering the Section 3553(a) factors, the district court "may not presume that the Guidelines range is reasonable." 128 S. Ct. at 596-597.

The Eighth Circuit has recognized and applied that principle. See, *e.g.*, *United States* v. *Henson*, 550 F.3d 739, 740 (2008), petition for cert. pending, No. 08-8933 (filed Feb. 20, 2009); *United States* v. *Toothman*, 543 F.3d 967, 970 (2008) ("A sentence within the Sentencing Guidelines range is accorded a presumption of substantive reasonableness on appeal, although the sentencing court does not enjoy the presumption's benefit when it determines the merits of the arguments by the prosecution or the defense that a Guidelines sentence should not apply."). The court in this case did not hold otherwise. Pet. App. 5-6.

Petitioner does not contend that the court of appeals articulated an incorrect legal standard in this case. Instead, he asserts (Pet. 21-23) that the court misread the record when it concluded that the district court had not applied a presumption of reasonableness. This Court generally does not grant review, however, "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

b. In any event, the decision of the court of appeals is correct. Based on the record in this case, the court correctly concluded that the district court had not applied a presumption that a within-Guidelines sentence would be reasonable. Pet. App. 6. Significantly, the district court never stated that it was applying a presumption of reasonableness. Petitioner relies (Pet. 22-23) on the district court's statements, in response to his request for a non-Guidelines sentence, that "there's got to be a ground for a variance," Pet. App. 30; that "the Guidelines * * * are viewed in the Eighth Circuit now as affirmed by the United States Supreme Court as presumptively reasonable," *id.* at 29-30; and that "[t]he Sentencing Guidelines are presumed reasonable here in the Eighth Circuit Court of Appeals," *id.* at 36. Those statements do not indicate, however, that the district court itself applied a presumption of reasonableness. The Eighth Circuit has never held that district courts must apply a presumption of reasonableness in sentencing a defendant. Thus, the district court's statements—which expressly refer to the Eighth Circuit—are most naturally read as simply acknowledging the *appellate* presumption of reasonableness.

The district court's actions in sentencing petitioner also confirm that it did not apply a presumption of rea-

sonableness. As a matter of procedure, the court consulted the properly calculated Guidelines range, considered the other Section 3553(a) factors, and fully explained the reasons for its sentence. Pet. App. 35-37. In particular, the court repeatedly made clear its independent view that a substantial sentence was necessary to reflect the seriousness of the offense and to provide the necessary general deterrence, given the nature of the crimes that petitioner committed and the fact that "the number of images involved here and the amount of trading of files puts this case above the garden variety." *Id.* at 35. Both the court's process and its ultimate conclusion reflect independent judicial analysis, a balancing of factors, and the "adversarial testing contemplated by federal sentencing procedure" and Section 3553(a). *Rita*, 127 S. Ct. at 2465. Nothing in the record suggests that the sentencing court was swayed by a belief that the Guidelines range was presumptively reasonable.[1]

Nor is there any indication that the district court wished to impose a lower sentence but felt legally constrained from doing so. Instead, the court carefully balanced the competing factors of petitioner's personal history against the court's view that child-pornography offenses are among the most serious and harmful crimes and that petitioner's conduct was "above the garden variety." Pet. App. 35. Given the seriousness of the offense and the need for deterrence, the court concluded that a sentence of 210 months of imprisonment was appropriate. *Id.* at 35-37; see *id.* at 37 ("I conclude that

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[1] Petitioner's reliance (Pet. 20-21) on *United States* v. *Ross*, 501 F.3d 851 (7th Cir. 2007), is misplaced. *Ross* differs from this case because the district court there erroneously stated that the "lowest sentence *possible*" was the bottom of the Guidelines range. *Id.* at 854 (emphasis added).

the Guideline system adequately addresses the circumstances of *this defendant*.") (emphasis added).

Petitioner notes (Pet. 22) that the district court said "I can't do that" in response to petitioner's request for a non-Guidelines sentence. That does not demonstrate that the court believed it was not permitted to impose a non-Guidelines sentence, since an equally plausible interpretation is that the court simply did not see any basis for varying in this case. Indeed, the court expressly stated that the Guidelines are not mandatory, Pet. App. 36, and it asked petitioner to provide reasons for a variance of the magnitude petitioner had requested, *id.* at 30 ("[W]hat would the grounds be for a variance of the magnitude you are talking about?"). Moreover, that latter request was entirely appropriate. See *Gall*, 128 S. Ct. at 594 ("[A] district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications.").

c. Petitioner also contends (Pet. 22) that the court of appeals erred in presuming that the district court had correctly applied the law. The court of appeals, however, was merely applying the settled rule that, where ambiguity exists, the "usual presumption * * * is that a district court is aware of the law that it is called upon to apply." *United States* v. *Russell*, 870 F.2d 18, 20 (1st Cir. 1989); see *United States* v. *Carty*, 520 F.3d 984, 992 (9th Cir.) (en banc) ("We assume that district judges know the law and understand their obligation to consider all of the § 3553(a) factors, not just the Guidelines."), cert. denied, 128 S. Ct. 2491 (2008). The court of appeals did not rule out the possibility of error by the district court; it simply concluded that petitioner had

failed to demonstrate that the district court's ambiguous statements were erroneous.

2. Petitioner asserts (Pet. 28-34) that the court of appeals erred in applying plain-error review to his claim of procedural sentencing error. That claim lacks merit.

a. The courts of appeals agree that where, as here, a district court asks the parties if they have any objections to the sentence and "the relevant party does not object, then plain-error review applies on appeal to those arguments not preserved in the district court." *United States* v. *Vonner*, 516 F.3d 382, 385 (6th Cir.) (en banc), cert. denied, 129 S. Ct. 68 (2008). Contrary to petitioner's suggestion that the "circuits are all over the board with differing standards of review," Pet. 33, "no court of appeals * * * has rejected this * * * approach to clarifying objections to a criminal sentence." *Vonner*, 516 F.3d at 391; see, *e.g.*, *In re Sealed Case*, 527 F.3d 188, 191-192 (D.C. Cir. 2008) ("Appellant did not object to the district judge's failure to explain his reasons either orally or in writing * * * . We therefore review the sentence for plain error."); *id.* at 198 n.3 (Kavanaugh, J., dissenting) (same); *United States* v. *Perkins*, 526 F.3d 1107, 1111 (8th Cir. 2008) ("Because Perkins did not object to the district court's articulation of its reasoning, we review that issue for plain error."); *United States* v. *Mangual-Garcia*, 505 F.3d 1, 15 (1st Cir. 2007) (applying plain-error review to "the contention by both appellants that the district court failed adequately to explain its reasons for imposing the particular sentence within the range"), cert. denied, 128 S. Ct. 2081 (2008); *United States* v. *Verkhoglyad*, 516 F.3d 122, 127-128 (2d Cir. 2008) (same); *United States* v. *Lopez-Velasquez*, 526 F.3d 804, 806 (5th Cir.) (same), cert. denied, 129 S. Ct. 625 (2008); *United States* v.

Knows His Gun, 438 F.3d 913, 918 (9th Cir.) (same), cert. denied, 547 U.S. 1214 (2006); *United States* v. *Lopez-Flores*, 444 F.3d 1218, 1220-1221 (10th Cir. 2006) (applying plain-error review to a challenge "to the *method* by which the district court arrived at [a] sentence"), cert. denied, 127 S. Ct. 3043 (2007); see also *United States* v. *Dragon*, 471 F.3d 501, 505 (3d Cir. 2006) (applying plain-error review to a claim that "the District Court failed to adequately consider the parsimony provision of [18 U.S.C.] 3553(a)").[2]

b. Petitioner is also incorrect in his assertion (Pet. 23) that the decision below, applying plain-error review to an unpreserved procedural error, "circumvent[s]" this Court's decision in *Gall*. As the Court explained in *Gall*, a court of appeals reviews a sentence under a two-step procedure. The court of appeals "must first ensure that the district court committed no significant procedural error." *Gall*, 128 S. Ct. at 597. Second, "[a]ssuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Ibid.*

Nothing in *Gall* suggests that parties are no longer obligated to raise all arguments concerning the appropriate procedures at sentencing. The decision in *Gall* therefore does not call into question this Court's prior

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[2] Petitioner suggests (Pet. 29) that the decision below is inconsistent with *United States* v. *Burnette*, 518 F.3d 942 (8th Cir. 2008). The court in *Burnette* held, however, in accord with the decision in this case, that "[p]rocedural sentencing errors are forfeited, and therefore may be reviewed only for plain error, if the defendant fails to object in the district court." *Id.* at 946. In any event, any intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

statement that courts of appeals, in reviewing criminal sentences, should apply "ordinary prudential doctrines, * * * [such as] whether the issue was raised below and whether it fails the 'plain-error' test." *United States* v. *Booker*, 543 U.S. 220, 268 (2005). A procedural error at sentencing is subject to the general principle that any error "not brought to the [district] court's attention" is forfeited on appeal, unless it meets the four-part standard for reversible plain error. Fed. R. Crim. P. 52(b); see *United States* v. *Olano*, 507 U.S. 725, 732 (1993).

This Court has regularly applied the plain-error rule in circumstances where a timely objection would have permitted the trial court to avoid error. The Court has noted the benefits of "concentrat[ing] * * * litigation in the trial courts, where genuine mistakes can be corrected easily." *United States* v. *Vonn*, 535 U.S. 55, 72 (2002) (applying plain-error review to an unpreserved claim that the district court failed to hold an adequate guilty-plea colloquy); see *Puckett* v. *United States*, No. 07-9712 (Mar. 25, 2009), slip op. 4-6. Indeed, "the point of the plain-error rule [is that] * * * the defendant who just sits there when a mistake can be fixed" cannot "wait to see" whether he is satisfied with the judgment, and, if not, complain to the court of appeals later on. *Vonn*, 535 U.S. at 73. This Court has already made clear that it will not "creat[e] out of whole cloth * * * an exception to [Rule 52(b)]." *Johnson* v. *United States*, 520 U.S. 461, 466 (1997). Nothing about the present case compels a contrary result.

Petitioner suggests (Pet. 30-31) that the court of appeals' application of plain-error review conflicts with Federal Rule of Criminal Procedure 51(b), which provides that "[a] party may preserve a claim of error by informing the court—when the court ruling or order is

made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b). Petitioner's reliance on Rule 51(b) is misplaced. Under Rule 51(b), petitioner's request for a variance from the Guidelines range preserved his challenge to the substantive reasonableness of the sentence that was ultimately imposed, and the court of appeals therefore reviewed the reasonableness of that sentence for abuse of discretion. Pet. App. 12-13. With respect to the district court's asserted *Gall* error, however, petitioner did not satisfy the requirement of Rule 51(b), because he never "inform[ed] the court" of "the action [he wished] the court to take," *i.e.*, not requiring extraordinary circumstances for a variance. See *Vonner*, 516 F.3d at 391 ("Nor is it the case that a request for a variance in the district court by itself preserves *all* procedural and substantive challenges to a sentence," and counsel has an "obligation to raise all arguments concerning the appropriate procedures at sentencing and the bases for a lower or higher sentence.").[3]

c. Finally, petitioner suggests (Pet. 10-11) that the court of appeals erred in concluding that, notwithstanding the district court's plain error in applying an "extraordinary circumstances" requirement, the error did not affect petitioner's substantial rights. To the extent

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[3] This Court has denied several similar petitions involving the standard of review in procedural-error sentencing cases where the defendant made no objection in the district court. See, *e.g.*, *Gomez* v. *United States*, No. 08-7778 (Mar. 23, 2009); *Vasquez-Rodriguez* v. *United States*, No. 08-7046 (Mar. 23, 2009); *Vaughn* v. *United States*, 129 S. Ct. 998 (2009) (No. 08-6064); *Commodore* v. *United States*, 129 S. Ct. 487 (2008) (No. 07-11206); *Vonner* v. *United States*, 129 S. Ct. 68 (2008) (No. 07-1391). There is no reason for a different result here.

petitioner contends that the court of appeals erred in holding that the district court's error was harmless, that case-specific argument does not warrant this Court's review. In any event, in light of the district court's statements that petitioner "knew when [he was] doing it that it was wrong," Pet. App. 35, and that the large number of images and extensive amount of trading "put[] this case above the garden variety," *ibid.*, the court of appeals correctly concluded that there was no reasonable probability that the district court would have imposed a lower sentence but for its *Gall* error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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